STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES MICHAEL STEVENS,

Defendant-Appellant.

UNPUBLISHED
July 2, 1999

No. 207989
Saginaw Circuit Court
LC No. 96-012570 FC

Before: Cavanagh, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Defendant appeals of right from his jury trial convictions of carrying a dangerous weapon with unlawful intent, MCL 750.226; MSA 28.423, first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), assault with intent to rob while armed, MCL 750.89; MSA 28.284, and carjacking, MCL 750.529a; MSA 28.797(a). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to concurrent terms of twenty to thirty years' imprisonment for each conviction. We affirm.

I

Defendant first contends that the trial court abused its discretion by admitting evidence of his flight from the police. However, because defendant did not object to the admission of this evidence below,[1] our review of this issue is only for manifest injustice. See *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998).

After reviewing the record, we discern no manifest injustice. It is well established in Michigan law that evidence of flight is admissible. Such evidence is probative because it may indicate consciousness of guilt, although evidence of flight by itself is insufficient to sustain a conviction. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). The term "flight" has been applied to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody. *Id*. Accordingly, the trial court did not abuse its discretion in admitting evidence of defendant's flight from the police, and defendant is not entitled to relief.

II

Defendant next contends that he was denied due process when the trial court allowed into evidence an excerpt from a letter he had written to his mother. In order to preserve an evidentiary issue for appellate review, a party must timely object at trial and specify the same ground for objection that it asserts on appeal. *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997). At trial, defendant objected to admission of the evidence on the basis that the statement contained in the letter had been a prediction of the outcome of the trial rather than an admission of guilt. On appeal, defendant contends that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Because this issue has not been properly preserved, we review it only for manifest injustice. See *Ramsdell, supra*.

We find no manifest injustice. In the letter, in referring to the trial in this case, defendant stated, "I am guilty on that deal." The trial court properly admitted this statement as the admission of a party-opponent under MRE 801(d)(2)(A). Furthermore, given that defendant's mother had already testified regarding other incriminating admissions that defendant had made to her, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. See MRE 403.

III

Defendant next contends that the trial court erred in failing to grant his motion for a directed verdict on the carjacking charge. To review a trial court's ruling with regard to a motion for a directed verdict, this Court considers the evidence presented in the light most favorable to the prosecution to determine whether a rational factfinder could find that the essential elements of the charged crimes were proved beyond a reasonable doubt. *People v Davis*, 216 Mich App 47, 52-53; 549 NW2d 1 (1996).

Defendant argues that his motion for a directed verdict should have been granted because the car was not taken "in the presence" of the complainant, as required by MCL 750.529a; MSA 28.797(a). We disagree. This Court has adopted the following test for the "presence" requirement of the carjacking statute: "[a] thing is in the presence of a person, in respect to robbery, which is within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it." *People v Raper*, 222 Mich App 475, 482; 563 NW2d 709 (1997), quoting *People v Beebe*, 70 Mich App 154, 159; 245 NW2d 547 (1976), quoting *Commonwealth v Homer*, 235 Mass 526, 533; 127 NE 517 (1920). Thus, whether the taking of a motor vehicle occurs within the presence of a person depends on the effect of violence or fear on that person's ability to control his possession of the motor vehicle at the time of its taking. *People v Green*, 228 Mich App 684, 695; 580 NW2d 444 (1998).

Defendant argues that *Raper* is distinguishable because in that case the carjacking occurred out in the open, whereas in the instant case defendant confronted the complainant in his house and the car was located in the garage. We do not consider this distinction relevant. While in his garage, the car was clearly in the complainant's "reach, inspection, observation or control," and if not for defendant's actions, he could have retained control of it. See *Raper, supra*.

The complainant testified that he surrendered his car only because defendant threatened to shoot him if he did not. Thus, viewing the evidence in the light most favorable to the prosecution, a rational factfinder could find that the car was taken "in the presence" of the complainant. See *Davis*, *supra*. The trial court did not err in denying defendant's motion for a directed verdict.

IV

Defendant next contends that the trial court erred by refusing to give a requested instruction on the lesser offense of second-degree home invasion. Regardless of the evidence in a given case, the court must instruct the jury on necessarily included lesser offenses. *People v Lemons*, 454 Mich 234, 254; 562 NW2d 447 (1997). Necessarily included lesser offenses encompass situations in which it is impossible to commit the greater offense without first having committed the lesser. *People v Hendricks*, 446 Mich 435, 443; 521 NW2d 546 (1994). However, the trial court's failure to instruct on a necessarily included offense does not require reversal of the defendant's conviction unless there is a determination that the error was not harmless. *People v Mosko*, 441 Mich 496, 501-503; 495 NW2d 534 (1992).

MCL 750.110a; MSA 28.305(a) provides in pertinent part:

> (2) A person who breaks and enters a dwelling with intent to commit a felony or a larceny in the dwelling or a person who enters a dwelling without permission with intent to commit a felony or a larceny in the dwelling is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling.
>
> (3) A person who breaks and enters a dwelling with intent to commit a felony or a larceny in the dwelling or a person who enters a dwelling without permission with intent to commit a felony or a larceny in the dwelling is guilty of home invasion in the second degree.

Both first- and second-degree home invasion require a showing that the defendant broke and entered a dwelling with the intent to commit a felony in the dwelling. First-degree home invasion further requires that the defendant was armed with a dangerous weapon or another person was lawfully present in the dwelling. Because it is not possible to commit first-degree home invasion without also committing second-degree home invasion, the latter is a necessarily included offense of the former. See *Hendricks*, *supra*. Accordingly, the trial court erred in refusing defendant's request for an instruction on second-degree home invasion. See *Lemons*, *supra*.

Nevertheless, we conclude that defendant is not entitled to any relief. At trial, defendant claimed that he was intoxicated and thus incapable of possessing the requisite intent. Defendant never challenged testimony at trial establishing that he was armed with a knife and that the complainant was

present when he entered the house. Thus, both of the elements that elevate second-degree home invasion to first-degree home invasion were not in dispute. Accordingly, the trial court's failure to instruct on second-degree home invasion was harmless error. Cf. *Mosko, supra* at 505-506 (failure to instruct on third-degree criminal sexual conduct was harmless where the existence of a familial relationship was not at issue); *People v Dunham*, 220 Mich App 268, 274-275; 559 NW2d 360 (1996) (failure to instruct on third- and fourth-degree criminal sexual conduct was harmless where the victim's age was not at issue).

V

In his final allegation of error, defendant contends that he was deprived of his right to be free from double jeopardy. A double jeopardy issue constitutes a question of law that is reviewed de novo on appeal. *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995).

Defendant has not clearly articulated how he was deprived of his right to be free from double jeopardy. After reviewing the record, we find no violation of the constitutional double jeopardy protections.[2] Defendant was not subjected to a second prosecution for the same offense after acquittal, successive prosecutions for the same offense after conviction, or multiple punishments for the same offense. See *People v Torres*, 452 Mich 43, 64; 549 NW2d 540 (1996), quoting *United States v Wilson*, 420 US 332, 343; 95 S Ct 1013; 43 L Ed 2d 711, 717 (1975). The prosecutor properly joined at one trial all the charges against defendant, as they grew out of a continuous time sequence and displayed a single intent and goal. See *People v Sturgis*, 427 Mich 392, 401; 397 NW2d 783 (1986). In addition, defendant was not improperly subjected to multiple punishments for the same offense. See *People v Whiteside*, 437 Mich 188, 200; 468 NW2d 504 (1991). The offenses of which defendant was convicted all have different elements and protect against violations of different societal norms. Moreover, the statutes are not hierarchical or cumulative. See *Lugo, supra* at 706.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Hilda R. Gage

[1] In his appellate brief, defendant asserts that this issue was preserved through his motion for a new trial. However, the purpose of the appellate preservation of error requirement is to induce litigants to do what they can in the trial court to prevent error and eliminate its prejudice, or to create a record of the error and its prejudice. *People v Schmitz*, 231 Mich App 521, 527-528; 586 NW2d 766 (1998). Therefore, a party opposing the admission of evidence must timely object at trial and specify the same ground for objection that it asserts on appeal. To be timely, an objection should be interposed between the question and the answer. *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997). Because defendant did not timely object in the trial court, this issue is not properly preserved for appellate review.

[2] See US Const, Am V; Const 1963, art 1, sec 15.